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32425 7590 06/04/2009 FULBRIGHT & JAWORSKI L.L.P. 600 CONGRESS AVE. SUITE 2400 AUSTIN, TX 78701			EXAMINER HAMILTON, LALITA M	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TOMAS LEON and LEWIS J. SPELLMAN

Appeal 2009-001227
Application 09/550,752
Technology Center 3600

Decided:¹ June 4, 2009

Before JOHN C. MARTIN, MURRIEL E. CRAWFORD, and
JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

MARTIN, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 34-45, which are all of the pending claims, for obviousness over the prior art. Oral argument was heard on May 21, 2009.

We have jurisdiction under 35 U.S.C. § 6(b) (2002). We affirm-in-part and enter a new ground of rejection under 35 U.S.C. § 101.

A. Appellants' invention

Appellants' claims recite inflation-adjusted financial instruments.

B. The claims

The independent claims are claims 34, 38, and 42, which read as follows:

34. An inflation adjusted financial instrument comprising:
a principal component, the principal component being
periodically adjusted for inflation based on the
Consumer Price Index (CPI) to obtain an inflation-
adjusted principal component;
an accrual component including an interest rate fixed for
a term of the financial instrument;
wherein periodic interest payments are paid based on the
inflation-adjusted principal component at the time
said periodic interest payments are paid; and
wherein the inflation-adjusted principal component
is payable at the end of the term.
38. An inflation adjusted financial instrument comprising:

a principal component;
an accrual component having fixed and variable interest components payable periodically, said variable interest component being adjusted for inflation based on the Consumer Price Index (CPI); and
wherein the principal component is payable at the end of a term of the financial instrument.

42. An inflation adjusted financial instrument comprising:
a principal component;
an accrual component having fixed and variable interest components payable at the end of a term of the financial instrument, said variable interest component being adjusted for inflation based on the Consumer Price Index (CPI); and
wherein the principal component is payable at the end of the term of the financial instrument.

Claims App., Br. 28-29.

C. Related Proceedings

The application on appeal (09/550,752) identifies itself as a continuation of Application 09/184,752 (Patent 6,052,673), identified as a continuation of Patent 5,832,461 (based on Application 07/780,834), identified as a continuation of Application 07/187,054 (abandoned), identified as a continuation of Patent 4,742,457 (based on Application 06/770,493), filed August 27, 1985. Preliminary Amendment at 1.

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The '461 and '673 patents were the subjects of Reexamination Control Nos. 90/005,841 and 90/005,842, respectively. In appeals (Nos. 2005-2642 and 2005-2643) to the Board in both proceedings, the Board affirmed rejections based on different prior art than is before us in this appeal.² Those Board decisions were affirmed in *In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1301 (Fed. Cir. 2007).

D. The references involved in this appeal

The Examiner relies on the following references:

Robbins	US 4,194,242	Mar. 18, 1980
Youden et al. ("Youden")	US 4,232,367	Nov. 4, 1980

² The affirmed rejections are based on the following references, listed at page 11 of the Board decisions in Appeal Nos. 2005-2642 and 2005-2643:

(a) Musmanno et al. U.S. Patent 4,774,663, issued September 27, 1988.

(b) Zvi Bodie, *An innovation for stable real retirement income*, Portfolio Management, Fall 1980, at 5-13.

(c) Santosh Mukherjee and Claire Orlans, *Indexation in an Inflationary Economy – A Case Study of Finland*, Vol. XL, Broadsheet No. 551, PEP, The Social Science Institute, April 1975, at 50-73 and 106-11.

(d) Persio Arida and André Lara-Resende, *Inertial Inflation and Monetary Reform: Brazil*, in *INFLATION AND INDEXATION* [–] *Argentina, Brazil, and Israel* 27-37 (John Williamson ed., March 1985).

(e) Gloria J. Weiner, *Choosing a home equity plan*, 84 Restaurant Business 100 (Feb. 10, 1985).

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Aztec Properties, Inc. v. Union Planters Nat'l Bank of Memphis, 530 S.W.2d 756 (1975) ("*Aztec Properties*")

U.S. Department of Labor, Bureau of Labor Statistics, Most Requested Statistics, <http://data.bls.gov/cgi-bin/surveymost?cu>, last visited June 26, 2003 ("U.S. Dept. of Labor")

E. The rejections involved in this appeal

Claims 34, 36, and 37 stand rejected under 35 U.S.C. § 103(a) for obviousness over Youden in view of *Aztec Properties*.

Claim 35 stands rejected under § 103(a) for obviousness over Youden in view of *Aztec Properties* and U.S. Dept. of Labor.

Claims 38, 40-42, 44, and 45 stand rejected under § 103(a) for obviousness over Youden in view of *Aztec Properties* and Robbins.

Claims 39 and 43 stand rejected under § 103(a) for obviousness over Youden in view of *Aztec Properties*, Robbins, and U.S. Dept. of Labor.

THE SCOPE AND MEANING OF THE RECITED
"FINANCIAL INSTRUMENT"

We understand the Examiner to be reading the "financial instrument" recited in claims 34, 38, and 42 on Youden's calculator device rather than on any of the deposit accounts disclosed therein: "[T]he Youden reference discloses a financial instrument having a principal component (the principal amount) that may be periodically adjusted for inflation (by using the financial instrument to calculate the principal amount adjusted for inflation)-col.2, lines 15-25 and 35-40 and col.5, lines 30-48."). Answer 3-4. We do

not agree that the recited “financial instrument” can be read on Youden’s calculator device. To do so fails to give weight to the fact that the claims specify that each “financial instrument” comprises “a principal component” and an “accrual component.” We conclude that the term “instrument” as used in the claims has its ordinary and customary meaning of “a legal document (as a deed, will, bond, lease agreement, mortgage, note, power of attorney, ticket on a carrier, bill of lading, insurance policy, warrant, writ) evidencing legal rights or duties, esp. of one party to another.” *Webster’s Third New Int’l Dictionary of the English Language - Unabridged* (1971 ed.) 1172 (copy enclosed).

DOES YODEN DISCLOSE A FINANCIAL INSTRUMENT
HAVING A COMPONENT THAT IS ADJUSTED FOR INFLATION?

Youden explains that as the rate of inflation and, hence, the cost of living grows higher, the need to produce correspondingly higher earnings from one's investments grows greater, especially for persons who need, on a regular basis, a predetermined minimum income on which to live. Youden, col. 1, ll. 7-12. Youden’s invention is a calculating device that is capable of calculating minimum principal which could be deposited in one or more accounts with depletion-of-principal penalties so as to provide both maximum interest and penalty-free payments. *Id.* at col. 1, ll. 34-40.

Youden's Figure 3A is reproduced below:

NO DESIRED PAYMENT AMOUNT SPECIFIED		
Term (4 years)	4.	***
Deposit for Residual	8.88	***
Residual	8.88	***
Interest Rate	7.58	***
Term (3 years)	3.	***
Minimum Deposit	1088.88	***
Monthly Payment	106.89	***
Interest Rate	7.58	***
Term (2 years)	2.	***
Deposit	1088.71	***
Monthly Payment	106.89	***
Interest Rate	7.00	***
Term (1 year)	1.	***
Deposit	1173.49	***
Monthly Payment	106.89	***
Interest Rate	6.50	***
Deposit	1145.48	***
Monthly Payment	106.89	***
Interest Rate	5.25	***
Inflation Rate	0.88	***
Total Deposit	4487.68	***
Residual	8.88	***
Total	4487.68	***

Fig. 3A

Figure 3A shows an example of output data produced by Youden's calculator. *Id.* at col. 1, ll. 66-68. Specifically, these data show the minimum deposits to the various term and passbook accounts required to generate monthly payments of \$106.89 over a period of four years. *Id.* at col. 2, ll. 44-50. During the first year the depositor receives a monthly payment of \$106.89 consisting of principal and interest from the passbook

account, into which \$1,145.40 was deposited at the beginning of the first year. *Id.* at col. 2, ll. 59-62. During this first year, the initial deposits to the term accounts are earning interest at their respective rates. At the end of the first year, the balance in the 1-year term account is transferred to the passbook account, where it is used during the second year to continue to pay the depositor \$106.89 per month. *Id.* at col. 3, ll. 33-38.

The calculator also allows the effects of inflation to be taken into account when making the calculations:

To include the effects of inflation or deflation in the calculations, monthly payments may be increased or decreased each year by a selected percentage. For example, if it is desired that the payments reflect a yearly inflation rate of six percent as shown in FIG. 3F, the user enters the numeric quantity "6.00" by depressing appropriate ones of keys 27 followed by depressing the inflation/deflation (I/D) key 42. If the entered numeric quantity is positive, the monthly payments are increased (inflated) each year by the percentage (e.g., 6%) specified. If the entered numeric quantity is negative, the monthly payments are decreased (deflated) each year by the specified percentage.

Id. at col. 5, ll. 29-41.

Figure 3F, discussed above, is reproduced below:

NO DESIRED PAYMENT AMOUNT SPECIFIED		
\$1000 DEPOSIT-- FOR-RESIDUAL		
6% INFLATION		
Term (4 years)	4.	***
Deposit for Residual	1000.00	***
Residual	1349.62	***
Interest Rate	7.50	***
Term (3 years)	3.	***
Minimum Deposit	1000.00	***
Monthly Payment	106.89	***
Interest Rate	7.50	***
Term (2 years)	2.	***
Deposit	1027.00	***
Monthly Payment	100.04	***
Interest Rate	7.00	***
Term (1 year)	1.	***
Deposit	1044.40	***
Monthly Payment	95.13	***
Interest Rate	6.50	***
Deposit	961.71	***
Monthly Payment	89.74	***
Interest Rate	5.25	***
Inflation Rate	6.00	***
Total Deposit	4033.19	***
Residual	1000.00	***
Total	5033.19	***

Fig. 3F

Figure 3F shows calculations reflecting a yearly inflation rate of six percent.

Id. at col. 5, ll. 31-33.

The \$89.74 monthly payment received by depositor during the first year increases to \$95.13 during the second year, etc.

Appellants do not deny that Youden's term accounts correspond to financial instruments and include a principal component and an interest component.

Appellants argue that although Youden discloses taking inflation into account while calculating the initial deposits for those term accounts, "Youden in no way teaches the *adjustment* of the account for inflation, as the term 'adjustment' necessarily implies a modification to the account *after* the initial deposit is made." Br. 9.

We do not agree. The claim 34 language "the principal component being . . . adjustable for inflation" is broad enough to read on using Youden's calculator to determine the initial deposit amount required for the term accounts in order to compensate for a predicted future value of inflation. Nor does claim 34's additional recitation that the inflation adjustment is based on the Consumer Price Index (CPI) require that the inflation adjustments be made after the term accounts are created. The above-quoted language of claim 34 is broad enough to read on using the calculator to calculate the required initial deposit amounts based on the assumption that the future inflation rate will be the same as the past inflation rate represented by the CPI.

However, Youden does not satisfy the additional requirement of claim 34 for *periodic* inflation adjustments or the requirement for periodic interest payments calculated using an inflation-adjusted principal component. Instead, the interest rate of each of Youden's term accounts is fixed. For this

reason, Youden also fails to satisfy claim 42's requirement for a variable interest component that is adjusted for inflation and claim 38's requirement for a variable interest component that is periodically adjusted for inflation.

DOES *AZTEC PROPERTIES* DISCLOSE A FINANCIAL INSTRUMENT HAVING AN INTEREST COMPONENT ADJUSTED FOR INFLATION?

In contrast to Youden, *Aztec Properties* does disclose an inflation-adjusted financial instrument.

Aztec Properties, which involved an action to recover on a promissory note, describes a financial instrument that included an adjustment for past inflation as reflected in the Consumer Price Index. The court explained:

On July 12, 1974, Aztec Properties, Inc., executed promissory note payable to Union Planters National Bank of Memphis in exchange for a \$50,000.00 loan. The promisor agreed to pay the promisee \$50,000.00, 'in constant United States Dollars adjusted for inflation (deflation)' with interest at ten percent per annum. The adjusted principal was to be calculated according to a formula contained in the note, to wit:

'Amount of principal due shall equal the amount of original principal multiplied by the consumer price index adjustment factor. This adjustment factor shall be computed by dividing the consumer price index at maturity by the consumer price index on date of borrowing. Said consumer price index numbers shall be for the most recent month available preceding borrowing and maturity dates. This consumer price index shall be the index not seasonably adjusted for all items as reported by the United States Department of Labor.'

On maturity of the note Aztec Properties repaid to the bank \$50,000.00, with discounted interest at the rate 9.875 percent, in the amount of \$419.35 (which is an effective yield of 9.96% per annum), but the borrower refused to pay the additional 'indexed principal' of \$500.00, based on the inflation adjustment formula.

Aztec Properties, 530 S.W.2d at 757. We understand the court to be saying that the \$419.35 in interest was paid to the bank as a single payment at maturity along with the \$50,000 in principal. It also appears that the unpaid "indexed principal" amount of \$500.00 was due at that time.

The court characterized the "indexed principal" amount as "interest" (specifically as "usurious interest.") *Id.* at 759. Appellants do not deny that the "indexed principal" amount can accurately be characterized as "interest." As a result, the promissory note in *Aztec Properties* can be characterized as having a fixed (i.e., ten percent) interest component and a variable interest component that is adjusted and payable at maturity based on inflation as measured by the CPI, which appears to satisfy claim 42.

Appellants, after correctly pointing out that "the Youden patent does not teach, either explicitly or inherently, setting up an account that is paid out according to past, known inflation" (Br. 11), argue that "the other cited reference, *Aztec Properties*, also fails to teach or suggest this claim element (although it should be noted that the Action does not assert *Aztec Properties* teaches this element)." *Id.* This argument is unpersuasive with respect to *Aztec Properties* and claim 42 because that claim does not require an account that is paid out according to past, known inflation.

Because Appellants have not demonstrated that claim 42 fails to read on the promissory note disclosed in *Aztec Properties*, we are affirming the rejection of that claim for obviousness over Youden in view of *Aztec Properties* and Robbins.³ For the same reason, we are affirming the rejection of dependent claim 43 (specifying that the CPI index is the “Consumer Price Index for all urban consumers (CPI-U)”) for obviousness over Youden in view of *Aztec Properties*, Robbins, and U.S. Dept. of Labor, as to which claim Appellants merely repeat their claim 42 arguments. Br. 13.

Claim 44, which depends on claim 42, specifies that the financial instrument “comprises a debt instrument.” Appellants argue that *Aztec Properties* fails to disclose a debt instrument. *See* Br. 12 (“the Youden patent does not teach, either explicitly or inherently, a financial instrument comprising a debt instrument. Furthermore, the other cited reference, *Aztec Properties*, also fails to teach or suggest this claim element (although it should be noted that the Action does not assert *Aztec Properties* teaches this element).”). Appellants have not explained, and it is not apparent, why the promissory note described in *Aztec Properties* cannot accurately be

³ In sustaining a multiple-reference rejection under 35 U.S.C. § 103(a), the Board may rely on one reference alone without designating the affirmance as a new ground of rejection. *In re Boyer*, 363 F.2d 455, 458 n.2 (CCPA 1966) (citing *In re Bush*, 296 F.2d 491, 496 (CCPA 1961)).

characterized as a debt instrument. We are therefore affirming the rejection of claim 44 and its dependent claim 45, which is not separately argued.

DO THE CITED REFERENCES DISCLOSE OR
SUGGEST *PERIODIC* INFLATION ADJUSTMENTS TO
PRINCIPAL (CLAIM 34) OR INTEREST (CLAIM 38)?

As explained above, neither Youden nor *Aztec Properties* discloses a financial instrument having *periodic* inflation adjustments for a principal component or a variable interest rate component.

The Examiner asserts that “[t]he use of variable interest rate components in financial instruments is well known in the art” and cites Robbins for a teaching of “a method and system for determining and computing interest rates wherein the interest rate fluctuates (varies) (see abstract).” Non-Final Action 4.⁴ Robbins does not mention adjusting an interest rate for inflation. Instead, Robbins explains that the interest rate fluctuates according to the ratio of a borrower's funds on deposit with the lender to the borrower's outstanding indebtedness (or to the outstanding indebtedness combined with line of credit) at any time, and for the duration of a selected period of time. Robbins, abstract. The Examiner stated that

[w]ith regard to the variable interest rates, the Examiner incorporated Robbins as a teaching of this limitation, since Youden was silent as to the use of variable interest rates. The use of variable or fixed interest rates is well known and practiced by many banks and financial institutions to produce

⁴ The Non-Final Action is incorporated by reference in the Final Action at 2.

profit. Therefore, the Examiner incorporated Robbins as a teaching of variable interest rates, to demonstrate that the rates

may be varied to produce desirable profit when measured against inflation, which may potentially erode profit.

Answer 6.

We agree with Appellants that the cited references fail to disclose or suggest making periodic inflation adjustments to either the principal component (claim 34) or an interest component (claim 38) and are accordingly reversing the rejections of those claims and their dependent claims 35-37 and 39-41.

NEW GROUND OF REJECTION UNDER 35 U.S.C. § 101

Claims 36-45 are rejected under 35 U.S.C. § 101 because the claimed financial instruments are not patent-ineligible subject matter under § 101, which provides:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. § 101 (2002).

As explained in *Manual of Patent Examining Procedure* (rev. 7, July 2008) § 2106:

The burden is on the USPTO to set forth a prima facie case of unpatentability. Therefore if USPTO personnel determine that it is more likely than not that the claimed subject matter falls

outside all of the statutory categories, they must provide an explanation. For example, a claim reciting only a musical composition, literary work, compilation of data, >signal,< or legal document (e.g., an insurance policy) per se does not appear to be a process, machine, manufacture, or composition of matter.

Although the claims call for the performance of various actions (e.g., claim 34 recites “the principal component being periodically adjusted for inflation based on the Consumer Price Index” and specifies that “periodic interest payments are paid based on the inflation-adjusted principal component”), those actions represent legal obligations rather than process steps.

Furthermore, assuming for the sake of argument that the claims can be treated as process claims, the claimed subject matter nevertheless would be patent-ineligible. As explained in *In re Bilski*, 545 F.3d 943, 956 (Fed. Cir. 2008), “the machine-or-transformation test, properly applied, is the governing test for determining patent eligibility of a process under § 101.” “The machine-or-transformation test is a two-branched inquiry; an applicant may show that a process claim satisfies § 101 either by showing that his claim is tied to a particular machine, or by showing that his claim transforms an article.” *Id.* at 961. Appellants’ claims fail to recite any apparatus or call for transforming any article. As explained in *Bilski*, “[p]urported transformations or manipulations simply of public or private legal obligations or relationships, business risks, or other such abstractions cannot

meet the test because they are not physical objects or substances, and they are not representative of physical objects or substances.” 545 F.3d at 963.

Nor do any of the claimed financial instruments constitute a “machine,” an article of “manufacture,” or a “composition of matter” under § 101. As explained in *In re Nuijten*, 500 F.3d 1346 (2007), a “machine” under § 101 is “a concrete thing, consisting of parts, or of certain devices and combination of devices” (*id.* at 1355) (quoting *Burr v. Duryee*, 68 U.S. (1 Wall.) 531, 570, 17 L.Ed. 650 (1863)), articles of “manufacture” are “tangible articles or commodities” (*id.* at 1356), and the term “composition of matter” refers to “all compositions of two or more substances and all composite articles, whether they be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids.” *Id.* at 1357 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 308, 100 S.Ct. 2204, 65 L.Ed.2d 144 (1980)).

SUMMARY

The Examiner’s § 103(a) rejection of claims 42, 44, and 45 under 35 U.S.C. § 103(a) for obviousness over Youden in view of *Aztec Properties* and Robbins is affirmed, as is the Examiner’s § 103(a) rejection of claim 43 for obviousness over those references further considered in view of U.S. Dept. of Labor. The other rejections by the Examiner are reversed. The

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Examiner's decision that claims 34-45 are unpatentable over the cited prior art is therefore affirmed-in-part.

We have entered a new ground of rejection of claims 34-45 under § 101 for reciting patent-ineligible subject matter.

APPELLANTS' OPTIONS FOR RESPONDING TO
THE DECISION AND NEW GROUND OF REJECTION

Regarding the affirmed rejections, 37 C.F.R. § 41.52(a)(1) (2008) provides that "Appellant may file a single request for rehearing within two months from the date of the original decision of the Board" (emphasis added). The date of this decision appears in the caption at page 1.

Regarding the new ground of rejection pursuant to 37 C.F.R. § 41.50(b), that paragraph explains that "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." Appellants, within two months from the date of this decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

37 C.F.R. § 41.50(b) (2008).

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Should Appellants elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If Appellants elect prosecution before the Examiner and this does not result in allowance of the application, abandonment, or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. §§ 41.50(f), 41.52(b).

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)

ELD

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Enclosure: *Webster's Third New Int'l Dictionary of the English Language - Unabridged* (1971 ed.) 1172.

Notice of References Cited	Application/Control No. 09/550,752	Applicant(s)/Patent Under Reexamination Appeal No. 2009-001227	
	Examiner	Art Unit	Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
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NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages)
	U	<i>Webster's Third New International Dictionary of the English Language Unabridged</i> , G&C Merriam Co. 1172 (1971).
	V	
	W	
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*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
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MADE IN THE U. S. A.

On the backdrop of Australia's recent history in the Middle East, the article is a welcome contribution to the debate on the role of the state in the international system. The author's argument is that the international system is not a unitary one, in the sense that no single organization or institution can claim to represent the interests of all states. The author's argument is that the international system is not a unitary one, in the sense that no single organization or institution can claim to represent the interests of all states. The author's argument is that the international system is not a unitary one, in the sense that no single organization or institution can claim to represent the interests of all states.

[illegible][illegible]

[illegible][illegible]

Male. Head black, with a narrow white stripe on the vertex; antennae black, with the 1st segment white; thorax black, with a white stripe on the side; abdomen black, with a white stripe on the side; legs black, with a white stripe on the side. **Female.** Head black, with a narrow white stripe on the vertex; antennae black, with the 1st segment white; thorax black, with a white stripe on the side; abdomen black, with a white stripe on the side; legs black, with a white stripe on the side.

[illegible]